Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1993

DARRYL J. WOODS,

Petitioner,

against

JOSEPH CANDELA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

In order to avoid being barred by the statute of limitations, does an inmate have to file his civil rights claims, while his state criminal proceedings are pending, when the issues raised in his claims were fully litigated and decided adversely by the criminal trial court in a pre-trial suppression hearing and the inmate would therefore have been collaterally estopped from litigating his civil rights claims until after his conviction was reversed on appeal?

The Court of Appeals for the Second Circuit answered this question in the affirmative, holding that, in order to avoid the running of the statute of limitations, petitioner was required to commence his civil rights action while his criminal appeal was pending. This is in direct conflict with the Seventh Circuit's holding in *Heck v Humphrey,* 997 F.2d 355 (7th Cir. 1993), which held that the proper procedure is to permit the inmate plaintiff to exhaust his state criminal remedies and, if successful on his appeal from the judgment of conviction, allow him to file his civil rights claims under the federal doctrine of equitable tolling of the statute of limitations.

This Court granted certiorari in *Heck v Humphrey,* ____ US ____. Since the Second Circuit has rendered a decision directly contrary to the ruling by the Seventh Circuit on an identical issue, petitioner respectfully submits that the instant petition should be granted and that this case be consolidated for argument with *Heck.*

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Opinions Delivered in this Case

Woods v Candela, 825 F.Supp. 43 (S.D.N.Y. 1993)

Woods v Candela, 13 F.3d 574 (1994)

Jurisdiction

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254.

Statement of the Case

On September 25, 1989, while on patrol in the City of Newburgh, New York, respondent, a New York state trooper, stopped petitioner's vehicle. A vehicle with a similar description had been seen near the scene of two recent robberies and a recent larceny. Other than tinted windows, there was nothing wrong with petitioner's vehicle and respondent had no reason to believe that either petitioner or his passenger had committed or were about to commit a crime.

Respondent asked petitioner if there were any weapons in the vehicle and petitioner replied that he had a nightstick under the seat. Respondent searched the vehicle and found several items that matched the description of articles used in the robberies, an air rifle, a green cap, and a black cloth with two holes cut in it. Respondent arrested petitioner and shortly thereafter the items seized were offered to an Orange County Grand Jury and an indictment was handed up charging petitioner with the crimes of robbery in the first degree and criminal possession of a weapon in the fourth degree.

Petitioner filed an omnibus motion which sought an order suppressing the physical evidence found in petitioner's vehicle as well as petitioner's statements made to the police. The Orange County Court held a hearing on the motion and

determined that petitioner's constitutional rights had not been violated and denied suppression. The items and petitioner's statement were subsequently received in evidence at petitioner's jury trial and petitioner was found guilty as charged. On November 15, 1990, petitioner was sentenced to an indeterminate term of imprisonment of 12½ to 25 years.

Petitioner appealed from the judgment of his conviction to the Supreme Court of the State of New York, Appellate Division, Second Department, and on January 19, 1993, the court reversed the judgment of conviction and dismissed the indictment. The Appellate Division found that respondent did not have reasonable suspicion that the occupants of petitioner's vehicle were involved in criminal activity, that the intrusiveness of respondent's conduct exceeded that which is permissible during a normal traffic stop, that respondent had no justification for detaining petitioner to question him about matters unrelated to the traffic violation, and that the People failed to meet their burden of proving the voluntariness of petitioner's statement and purported oral consent to the search of the vehicle.

In his complaint against respondent filed in the District Court on May 6, 1993, petitioner claimed, *inter alia,* that respondent violated his Fourth Amendment right to be free from unreasonable searches and seizures without probable cause and his Fifth Amendment right to remain silent. Respondent moved to dismiss the claims pursuant to F.R.C.P. Rule 12(b)(6) on the ground that they were untimely and barred by the three-year statute of limitations. In opposition to the motion, petitioner argued that although the police conduct which gave rise to the Fourth and Fifth Amendment violations occurred in September, 1989, his civil rights

claims should not be barred since the criminal court's denial of suppression was not reversed until January, 1993. The District Court granted respondent's motion in an opinion dated June 25, 1993, which cited as controlling the Court of Appeals for the Second Circuit's decision in *Mack v Varelas,* 835 F.2d 995 (2nd Cir. 1987). By Decision dated January 6, 1994, the Court of Appeals affirmed.

REASONS FOR GRANTING WRIT

Petitioner's Fourth and Fifth Amendment Claims are not Barred by the Statute of Limitations

In both the District Court and the Court of Appeals, petitioner argued that the application of the three-year statute of limitations from the date of respondent's illegal search and seizure would frustrate the policies underlying 42 U.S.C. 1983. Petitioner argued that the statute should be tolled to further the two principle policies of deterrence and compensation. *See Board of Regents v Tomanio,* 446 US 488 (1980). In rejecting this argument the Second Circuit held that "neither deterrence nor compensation is 'significantly affected by this rule of limitations since plaintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by commencing their actions within three years.' " *Woods,* 13 F.3rd at 577, *quoting Board of Regents, supra.*

Although it is well settled that under federal law a cause of action accrues when the plaintiff obtains knowledge of the facts of his claims, a difficulty arises when, as in the instant case, a court of competent jurisdiction conducts a full hearing upon the identical issues raised in the civil

rights claims and determines that no constitutional violations ever occurred. The opinion in *Triplett v Azordegan,* 478 F.Supp. 872 (ND Iowa 1977) dealt directly with this problem. The plaintiff Triplett alleged that he was deprived of his constitutional rights by virtue of his being drugged before confessing to a 1954 murder. Triplett was convicted and served 17 years in prison. In 1972 the state district court ordered that Triplett be released on the ground that his confession was involuntary and that all the charges be dismissed. Only then, the federal district court noted, "was there a determination that Triplett's rights had been violated", and it was not until this point in time that Triplett's action "ripened." *Triplett,* 478 F.Supp. at 875.

In *Triplett,* as in the case at bar, the defendant argued that the plaintiff knew all the operative facts [of his civil rights claim] in 1955 and should have sued then. In rejecting this argument the *Triplett* court stated, "It is almost too evident to warrant comment that petitioner, having been convicted of murder by virtue of a confession which in 1955 was deemed legal and admissible, could not have, at that time, pursued a Section 1983 claim." 478 F.Supp. at 875. This is because, the *Triplett* court pointed out, the prior criminal proceeding would work an estoppel in the subsequent civil proceeding, "so long as the question involved was 'distinctly put in issue and directly determined' in the criminal action." *Id.*

Petitioner's situation is identical. In *Triplett,* the state district court found that the conviction was based upon the involuntary confession. 478 F.Supp. at 875. In the case at bar, the conviction was ultimately found to have been based upon unconstitutionally obtained evidence and statement. In *Triplett,* the federal district court found that "the issue of

voluntariness was sufficiently raised at the original trial to warrant estoppel until the court reversed the conviction in 1972." In the case at bar, the Fourth and Fifth Amendment issues were sufficiently raised in petitioner's omnibus motion and pre-trial suppression hearing to warrant estoppel until the Appellate Division reversed the conviction in 1993.

Petitioner submitted to the courts below that when collateral estoppel comes into play, the *Triplett* court's observation is the correct one:

> To hold that a petitioner needed to ignore the criminal proceedings and immediately sue under Section 1983 would mean that petitioner would have had to pursue a technically possible, but at the time frivolous suit. To so argue is to read Kafka into law.

478 F.Supp. at 875.

The *Triplett* decision suggests that two of the three principle policies embodied in 42 U.S.C. 1983—deterrence and compensation—would be frustrated if the statute of limitations was not judicially tolled in these situations. Contrary to the conclusion reached by the courts below, petitioner submits that on the instant record both deterrence and compensation are "significantly affected" by not tolling the statute of limitations. Although incarcerated plaintiffs may, in theory, be able to enforce their claims by commencing their actions within three years from the accrual date, the practicalities are such that these inmates, who will have no one to commence their actions for them and who will be left to file their claims by themselves, will either not know that

they should file them or will be deterred from doing so by the exigencies of their criminal proceedings.

The Second Circuit imposes a fictitious legal sophistication upon the inmate. The inmate in many instances will be represented by an assigned attorney during both his trial and appellate criminal proceedings. His assigned attorney will have had experience primarily in defending the charges and/or seeking a reversal of the conviction. For the most part, the attorney will not be familiar with the various holdings on statutes of limitation in civil rights actions, since the *de facto* practice in the field of criminal defense does not include advising a client about his potential civil causes of action. A criminal defense attorney, particularly one who is assigned and, more particularly still, an assigned attorney working in a large legal aid office who has virtually no civil experience, is simply not expected to advise a defendant to commence an action predicated upon a violation of his civil rights while the criminal action is pending.

But even if the criminal defense attorney is familiar with the statute of limitations issues, he may be reluctant to advise his client, who is then awaiting trial and/or possible sentencing, to file a complaint, which more than likely would be *pro se*, as this might very well compromise his client's Fifth Amendment right to remain silent. Perhaps this would not be a problem if the plaintiff (criminal defendant) was being represented by a retained attorney who was prepared to assist his client in the drafting of his complaint. But most of the time the plaintiff (criminal defendant) would be left to his own resources, setting forth in writing allegations pertaining to his criminal proceedings that may prejudice him down the road. This would most certainly occur when, as in the case at bar, one of the civil rights

claims arises out of a violation of the plaintiff's (criminal defendant's) rights under the Fifth Amendment and he is testifying before his criminal jury about the manner in which the police obtained his statement(s). The prosecutor surely would confront the plaintiff (criminal defendant) with whatever the plaintiff may have written in his *pro se* complaint filed in the District Court, thereby bringing to the jury's attention the fact that he, the defendant on the stand, is seeking money damages from the police officer who had testified against him earlier in the same trial. Such a scenario forces an untenable choice upon the criminal defendant.[1]

The *Triplett* court was correct to recognize that the pursuit of "a technically possible, but at the time frivolous suit" is an untenable requirement to foist upon an inmate who is in the process of litigating state criminal charges against him. *Triplett*, 478 F.Supp. at 875. The Second Circuit requires such a pursuit and places the incarcerated

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[1]This concern is not ameliorated by the fact that most criminal trial proceedings are completed in less than three years from the date of the constitutional violation. The right to remain silent is still compromised during the appellate stage, since a retrial may be ordered (perhaps on unrelated grounds) therefor placing the plaintiff (criminal defendant) in the same predicament he would have been in if he had filed his *pro se* complaint before trial. What is more, as the District Court here points out:

> The current backlog in the New York Appellate Divisions, most notable in the Second Department, exacerbates this problem as it occurs in New York. Most state appellate decisions, like the one in the present case, are not rendered until the statute of limitations period of 1983 actions has expired.

Woods, 825 F. Supp. at 48.

potential plaintiff in a situation which frustrates the policies of deterrence and compensation of 42 U.S.C. 1983.

Without explicit reference to the *Triplett* decision, the Seventh Circuit in *Heck v Humphrey* adopted the *Triplett* court's reasoning and resolved the problem in the same manner:

> If instead of being stayed, the civil rights suit is dismissed, this sets the stage for confronting the issue of staleness head-on at a time when all the facts bearing on the issue will be known—when the plaintiff, having finally exhausted his state remedies, wishes to resume the civil rights case. When the defendants plead the statute of limitations to a refiled suit, the plaintiff can riposte with the doctrine of equitable tolling—a defense to the defense of statute of limitations. The doctrine is straightforward: "a person is not required to sue within the statutory period if he cannot in the circumstances reasonably be expected to do so."

Heck, 997 F.2d at 357, *quoting Central States, Southeast & Southwest Areas Pension Fund v Slotky*, 956 F.2d 1369, 1376 (7th Cir. 1992).

The *Heck* court recognized that its opinion directly conflicted with decisions from other circuits, including the Second Circuit. *Id.* at 357, 359. This Court granted certiorari in *Heck*, and petitioner respectfully requests that certiorari be granted in his case as well because the resolution by this Court of the inter-circuit conflict will certainly impact petitioner's case.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted and consolidated with *Heck v Humphrey.*

Dated: Goshen, New York
April 4, 1994

Respectfully submitted

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APPENDIX A—Opinion of the Circuit Court.

Darryl J. WOODS, Plaintiff-Appellant,

v.

Joseph CANDELA, Defendant-Appellee.

No. 653, Docket 93-7664.

United States Court of Appeals,
Second Circuit.

Argued Dec. 2, 1993.
Decided Jan. 6, 1994.

Arrestee brought civil rights action against police officer based on officer's alleged violations of arrestee's Fourth and Fifth Amendment rights. The United States District Court for the Southern District of New York, Gerald L. Goettel, J., 825 F.Supp. 48, dismissed action, and arrestee appealed. The Court of Appeals, Lumbard, Circuit Judge, held that arrestee's civil rights cause of action accrued when he was arrested and not when New York appellate court vacated his conviction.

Affirmed.

1. Limitation of Actions 95(1)

Generally, cause of action accrues when plaintiff knows or should know of injury that is basis of cause of action.

2. Limitation of Actions 95(15).

Arrestee's cause of action under civil rights statute based upon police officer's alleged violation of arrestee's Fourth and Fifth Amendment rights accrued on day of arrest; arrestee's alleged injuries occurred and arrestee gained knowledge of them when police officer conducted search, arrest and questioning. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amends. 4, 5.

3. Limitation of Actions 58(1)

Arrestee's civil rights cause of action based on constitutional violations accrued on date of his arrest and not on date that New York appellate court vacated his conviction; New York trial court's adverse ruling against arrestee did not present obstacle to arrestee's civil rights claim because, had arrestee timely filed his action, it would have been stayed by federal court while relevant state proceedings were pending. 42 U.S.C.A. § 1983.

4. Federal Courts 427

New York's tolling provisions governed tolling of New York's three-year statute of limitations which governed arrestee's civil rights action, 42 U.S.C.A. § 1983; N.Y.McKinney's CPLR 214, subd. 5.

5. Federal Courts 424

In determining application of state limitations period to federal cause of action, considerations of state law may be displaced where their application would be inconsistent with federal policy underlying cause of action under consideration.

6. Limitation of Actions 58(1)

Arrestee's civil rights cause of action based on constitutional violations would not be tolled to further goals of deterrence and compensation. 42 U.S.C.A. § 1983.

Robert N. Isseks, Goshen, NY (Alex Smith, Goshen, NY, of counsel), for plaintiff-appellant.

Frederic L. Lieberman, Asst. Atty. Gen. of the State of New York, New York City (Robert Abrams, Atty. Gen. of the State of New York, Albany, NY, of counsel), for defendant-appellee.

Before: LUMBARD, KEARSE and JACOBS, Circuit Judges.

LUMBARD, Circuit Judge:

Plaintiff-appellant Darryl J. Woods appeals from a judgment of the District Court for the Southern District of New York, Goettel, *Judge*, dismissing his complaint as barred by the statute of limitations. 825 F.Supp. 43. On appeal, Woods argues that the district court improperly (1) determined the date his cause of action accrued and (2) failed to toll the statute of limitations. We affirm.

We assume the facts to be as set forth in the complaint. On September 25, 1989, defendant-appellee Joseph Can-

dela, a New York State trooper, saw Woods driving a blue vehicle with tinted windows on South William street in Newburgh, New York. A vehicle with a similar description had been seen near the scene of two recent robberies and a recent larceny. Candela stopped Wood's car and asked Woods if he had any weapons in the car. Woods replied that he kept a nightstick under the seat. Candela then searched the vehicle, finding several items that matched the description of articles used in the robberies: an air rifle, a green cap, and a black cloth with two holes cut in it. Candela arrested Woods, searched him, handcuffed him, and advised him of his *Miranda* rights.

Shortly after Wood's arrest in 1989, the Orange County Grand Jury indicted him for first degree robbery and criminal possession of a weapon. Woods filed an omnibus motion seeking, *inter alia*, an order suppressing the evidence found in the vehicle and the statements made to the police on the day of his arrest. The county court denied these motions, and the prosecution used the seized evidence at trial. A jury found Woods guilty, and on November 15, 1990 the court sentenced him to 12½ to 25 years imprisonment.

Woods appealed his conviction to the Appellate Division, Second Department. On January 19, 1993 that court reversed the conviction and dismissed the indictment, holding that the county court erred in denying Wood's motion to suppress. The Appellate Division found that Candela's stop of Wood's car was justifiable because of Wood's traffic violation (driving with excessively tinted windows), but that Candela did not have reasonable suspicion to detain and question Woods.

On May 6, 1993, Woods commenced this action under 42 U.S.C. § 1983 against Candela in the District Court for the Southern District of New York. Woods alleged that Candela violated his Fourth Amendment rights to be free

from unreasonable searches and arrests without probable cause; his Fifth Amendment right to remain silent; and his Fourteenth Amendment rights to due process, equal protection, and substantive due process. Candela moved to dismiss on the grounds that: (1) the Fourth and Fifth Amendment claims were barred by the applicable statute of limitations, (2) the Fourteenth Amendment claims were barred by Candela's absolute immunity, and (3) the complaint failed to state a cause of action for malicious prosecution. Woods conceded the second and third points, and agreed to drop all claims except for those based on Candela's alleged violation of his Fourth and Fifth Amendment rights. The district court then dismissed those claims as barred by the statute of limitations.

New York's three year statute of limitations governs this action. *See Owens v. Okure*, 488 U.S. 235, 251, 109 S.Ct. 573, 582, 102 L.Ed.2d 594 (1989); New York Civ. Prac.L. & R. 214(5) (McKinney 1990). Since Woods commenced this action on May 6, 1993, it is time barred unless (1) it accrued after May 5, 1990, or (2) the statute of limitations was tolled.

Accrual of the Cause of Action

[1, 2] Federal law governs the question of when this claim accrued. *Morse v. University of Vt.*, 973 F.2d 122, 125 (2d Cir.1992). Generally, a cause of action accrues when the plaintiff knows or should know of the injury that is the basis of the cause of action. *Singleton v. City of New York*, 632 F.2d 185, 191 (2d Cir.1980), *cert. denied*, 450 U.S. 920, 101 S.Ct. 1368, 67 L.Ed.2d 347 (1981). Woods's alleged injuries occurred, and Woods gained knowledge of them, when Candela conducted the search, arrest and questioning; therefore, the cause of action accrued on September 25, 1989. *Day v.*

Morgenthau, 909 F.2d 75, 79 (2d Cir.1990) (opinion on petition for rehearing).

[3] Woods argues that the cause of action did not accrue until the state appellate court vacated his conviction. The county court had previously found that Candela did not violate Woods's constitutional rights. Under the doctrine of collateral estoppel, this ruling barred Woods from claiming in another action that his rights had been violated. Therefore, Woods argues, he "could first have *successfully* maintained a suit based on that cause of action" when the Appellate Division reversed his conviction on January 19, 1993, and the cause of action accrued on that date. *Santos v. District Council*, 619 F.2d 963, 968-69 (2d Cir.1980) (quoting *Bell v. Aerodex, Inc.*, 473 F.2d 869, 873 [5th Cir. 1973]) (emphasis added).

Woods relies on *Triplett v. Azordegan*, 478 F.Supp. 872 (N.D. Iowa 1977), in support of his position. In that case, the plaintiff, Triplett, was tried in state court for murder. At trial, he argued that his confession was inadmissible because he was drugged when he confessed. The trial court disagreed, and Triplett was convicted. He spent the next 17 years in prison until the state court ordered him released on the ground that his confession was involuntary. Triplett then brought a § 1983 action in federal court, alleging that his constitutional rights had been violated.

The District Court for the Northern District of Iowa held that the plaintiff's cause of action was not time barred because it did not "ripen" until the state court overturned the conviction. The court noted that the state trial court's decision would have a preclusive effect in a § 1983 action, and the plaintiff was not required to "pursue a technically possible, but at the time frivolous suit." 478 F.Supp. at 875.

Wood's reliance on *Triplett* is misplaced, as that case is at odds with the established law of this circuit, as expressed in *Mack v. Varelas*, 835 F.2d 995 (2d Cir. 1987). In that case, the plaintiff, Mack, was tried for robbery in state court. At trial, Mack asked the state to produce a witness who was incarcerated. When the sheriff's office failed to produce the witness, the court refused a continuance, holding that Mack's request was untimely and the witness's testimony was unlikely to be helpful. Mack appealed his conviction to the state appellate court, and also filed a § 1983 action in federal court. The federal district court dismissed the § 1983 action, holding that it could not hear the case until the state proceedings were complete.

On appeal, we agreed that the district could not adjudicate the claim while the state proceedings were pending because of their potential outcome-determinative effect. *Id.* at 999. However, we reversed because the district court should have stayed, not dismissed, the action. We reasoned that dismissal would have been appropriate if the claim had not accrued; however, the claim accrued on the date of the alleged violation of the plaintiff's rights. Moreover, we noted that the statute of limitation had begun to run, implying that if the dismissal were upheld, the statute of limitations could have prevented Mack from re-commencing the action after the criminal proceedings were complete.

Woods argues that *Mack* is not controlling. The question of whether Mack's rights were violated was not litigated in the state trial court; therefore, when Mack initiated his § 1983 action, there was no state court decision that would have collaterally estopped him from claiming a constitutional violation. In contrast, until January 19, 1993, there was an adverse state court decision that would have estopped Woods from asserting that his rights had been violated. Woods therefore submits that unlike Mack he should

not have been required to commence his action until the state appeal was decided. We disagree.

Woods's fear of the preclusive effect of the state trial court decision is unfounded. *Mack* requires federal courts to stay rather than dismiss § 1983 actions while relevant state proceedings are pending. Therefore, had Woods timely filed his action, it would have been treated that same as Mack's action; neither could have been dismissed while the appeal was pending, but both could have been dismissed later if the state appellate court ultimately found that there was no constitutional violation. Consequently, the adverse ruling in the state court did not present an obstacle to Wood's claim, and does not provide a basis for departing from *Mack*.

We therefore held that the cause of action accrued on September 25, 1989, and was time barred unless the statute of limitations was tolled.

Tolling the Statute of Limitations

[4, 5] New York's tolling provisions govern the tolling of the statute of limitations. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64, 95 S.Ct. 1716, 1721-22, 44 L.Ed2d 295 (1975). However, "consideration of state law may be displaced where their application would be inconsistent with the federal policy underlying the cause of action under consideration." *Id.* at 465, 95 S.Ct. at 1722. Woods concedes that no New York tolling provision applies here, but argues that application of the statute of limitations would frustrate the policies underlying § 1983.

[6] The Supreme Court has identified deterrence and compensation as two of the principal policies underlying 42 U.S.C. § 1983. *Board of Regents v. Tomanio*, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed2d 440 (1980). Woods contends that the cause of action should be tolled to further

these goals. However, neither deterrence nor compensation is "significantly affected by this rule of limitations since plaintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by commencing their actions within three years." *Id.* The *Mack* requirement that federal courts stay § 1983 actions until the completion of state proceedings protects plaintiffs by allowing them to commence their actions without fearing that the lower state court decision will bar recovery; at the same time, the requirement that plaintiffs file within three years protects defendants by putting them on notice of the claim and allowing them to preserve evidence for their defense.

Affirmed.

APPENDIX B—Opinion of the District Court.

Darryl J. WOODS, Plaintiff,

v.

Joseph CANDELA, Defendant.

No. 93 Civ. 3051 (GLG).

United States District Court,
S.D. New York,

June 25, 1993.

After reversal of conviction, plaintiff brought § 1983 action for false arrest. Defendant moved to dismiss. The District Court, Goettel, J., held that statute of limitations barred claim.

Motion granted

1. Federal Courts 427

Accrual of § 1983 claims is matter of federal law. 42 U.S.C.A. § 1983.

2. Limitation of Actions 58(1)

Section 1983 action for false arrest accrued, and New York's three-year statute of limitations began to run, on date of arrest, rather than reversal of conviction. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 4; N.Y. McKinney's CPLR 214, subd. 5.

3. Federal Courts 427

Federal courts have power to toll statutes of limitations borrowed from state law, but only where application of statute of limitations would frustrate policy underlying federal cause of action.

4. Limitation of Actions 58(1)

Court lacked power to toll state statute of limitations in order to allow § 1983 claim; neither deterrence nor compensation was significantly affected by rule of limitation since plaintiff could still readily enforce claims simply by commencing action within three years. 42 U.S.C.A. § 1983.

5. Federal Courts 427

Federal court in § 1983 action recognizes any state provisions for tolling limitations period. 42 U.S.C.A. § 1983.

6. Limitations of Actions 75

New York's three-year statute of limitations applicable to § 1983 action was not tolled during period of incarceration until reversal of conviction. 42 U.S.C.A. § 1983; N.Y.McKinney's CPLR 214, subd. 5; N.Y.McKinney's Civil Rights Law § 79.

Robert N. Isseks, Goshen, NY, for plaintiff.

Robert Abrams, Atty. Gen. of State of NY (by Frederick Lieberman), for defendant.

OPINION

GOETTEL, District Judge.

I. STATEMENT OF FACTS

This is a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Defendant Joseph Candela moves to dismiss this action, brought under 42 U.S.C. § 1983 by Plaintiff Darryl J. Woods on the grounds that Plaintiff's claims are untimely and barred by the statute of limitations.

For the purposes of a motion to dismiss, the facts are assured to be as set forth in the complaint.

On September 25, 1989, Defendant, who is a New York state trooper, stopped Plaintiff's vehicle because it matched a general description of a vehicle that had been spotted at the scene of several recent robberies. Defendant asked Plaintiff if there were any weapons in the car and Plaintiff replied that he had a nightstick under the driver's seat. Defendant testified during the subsequent criminal trial that he asked if there were any other weapons in the car and Plaintiff replied that there were none and offered to allow Defendant to search the entire vehicle.

Defendant testified that Plaintiff agreed to allow him to search the trunk and opened the trunk for him.

Defendant then looked again at the rear seat area, where he observed an air rifle, a green cap and a black piece of

cloth with two holes. Defendant testified the Plaintiff claimed ownership of the rifle. These articles matched a description of articles used by a perpetrator of recent armed robberies in the area.

Defendant advised Plaintiff that he was under arrest for criminal possession of the nightstick. Plaintiff denied his involvement in any robberies. At the police station, Plaintiff signed a form consenting to the previous search of his vehicle and to an additional search of the vehicle at the police station. Plaintiff was issued summonses for driving without a license and for having excessively tinted windows in his vehicle.

The evidence seized by Defendant was presented at a Grand Jury hearing in September or October of 1989 in which the Grand Jury charged Plaintiff with the crimes of robbery in the first degree and criminal possession of a weapon in the fourth degree.

After Plaintiff's arraignment, Plaintiff sought to suppress the evidence found in Plaintiff's vehicle as well as Plaintiff's statement to the police. The County Court denied these motions.

Plaintiff was tried by a jury. During the trial, the evidence seized from Plaintiff's vehicle by Defendant as well as Plaintiff's statements to the police were received in evidence. Plaintiff was found guilty and sentenced on November 15, 1990 to 12½ to 25 years imprisonment.

Plaintiff appealed and on January 19, 1993, the Appellate Division, Second Department reversed, dismissing the indictment against Plaintiff. 592 N.Y.S.2d 748. In its decision, the Appellate Division found that Plaintiff's motion to suppress the evidence found in his vehicle should have been granted. Although the stop was justifiable, the Appellate Division found that the circumstance did not provide Defendant with reasonable suspicion to detain and question

Plaintiff and, therefore, Defendant's inquiry as to whether Plaintiff had any weapons in the vehicle was impermissible. Furthermore, they held that the items recovered during the search should have been suppressed since a stop for a traffic offense will not justify a search of the motorist or of the vehicle unless there are reasonable grounds for believing the motorist guilty of a crime or if the officer has a reasonable, articulable basis to fear for his own safety. The Appellate Division found that Defendant had no such reasonable suspicion nor did he express any basis to fear for his safety.

Plaintiff was incarcerated for a period of two years and nine months.

On May 6, 1993, Plaintiff brought claims in federal court under the Fourth, Fifth and Fourteenth Amendments for false arrest and malicious prosecution. Upon Defendant's motion to dismiss. Plaintiff has dropped all claims except for violations of his rights under the Fourth and Fifth Amendments.

II. DISCUSSION

Defendant contends that Plaintiff's claims are barred by the governing statute of limitations. The statute of limitations applicable to civil rights claims under 42 U.S.C. § 1983 is that provided by the forum state for general or residual personal injury claims, *Owens v. Okure*, 488 U.S. 235, 251, 109 S.Ct. 578, 582, 102 L.E.2d 594 (1989). New York Civil Practice Law and Rules states that such claims are subject to a three year statute of limitations. New York Civil Practice Law and Rules § 214(5).

In order to decide whether the statute of limitations has run prior to the commencement of an action, the court must determine when the cause of action accrued and whether the running of the statute was subject to any toll.

A. *Accrual of the Claim*

[1, 2] Accrual with respect to claims brought pursuant to § 1983 is a matter of federal law. *Morse v. University of Vermont*, 973 F.2d 122, 125 (2d Cir. 1992). The general rule in the Second Circuit is that a cause of action accrues when the plaintiff knows or has reason to know of the injury that is the basis of his action. *Singleton v. City of New York*, 632 F.2d 185, 192 (2d Cir. 1980), *cert. denied*, 450 U.S. 920, 101 S.Ct. 1368, 67 L.Ed.2d 347 (1981). Defendant contends that the claim accrued on September 25, 1989. He notes that all his actions with respect to the alleged unreasonable search and seizure, the alleged arrest without probable cause, and the alleged denial of Plaintiff's right to remain silent occurred on that day. According to Defendant, Plaintiff's continuing incarceration does not imply a continuing tort. "The continuing violation doctrine may not be based on the continuing effects of earlier unlawful conduct." *Day v. Moscow*, 769 F.Supp. 472 (S.D.N.Y. 1991). See also, *Delaware State College v. Ricks*, 449 U.S. 260, 257-58, 101 S.Ct. 498, 503-04, 66 L.Ed.2 431 (1980). Plaintiff alleges no continuing unlawful acts, only continual ill effects from the original Fourth and Fifth Amendment violations which occurred on September 25, 1989.

The Second Circuit dealt with a similar situation in *Mack v. Varelas*, 836 F.2d 995 (2nd Cir. 1987). In that case, Plaintiff Mack was not allowed to produce an incarcerated witness for his defense, allegedly in violation of his Sixth Amendment rights. Mack's motion for a continuance was denied and Mack was convicted of first and second degree robbery. Mack's appeal was pending when he filed his § 1983 claim. His claim was deemed to have accrued on the date he was incarcerated allegedly in violation of his rights. Applying this reasoning to the current case, Plaintiff's

action accrued on the date when his Fourth and Fifth Amendment rights were allegedly violated, September 25, 1989, the date of his arrest. If this action accrued on September 25, 1989, the three year statute of limitations would have run and Plaintiff's claims would be untimely and therefore barred.

A case more favorable to Plaintiff is *Triplett v. Azordegan*, 478 F.Supp. 872 (N.D. Iowa 1977). In that case, Plaintiff Triplett had been convicted for murder in 1954 and served 17 years in jail before a judicial determination that Plaintiff was drugged when he made the confession upon which the conviction had been based—an issue raised both at trial and in post-trial motions. Upon his release in 1972, Plaintiff brought a § 1983 suit which the defendants sought to dismiss as time-barred. In that case, as in this one, the movant claimed that plaintiff knew all the operative facts at the time of the original incident and should have sued then. *Id.* at 874. The *Triplett* court, however, rejected that reasoning, noting that:

> In a § 1983 action it is necessary to first define the constitutional wrong on which the claim is based. Here the Plymouth County District Court did just that in October of 1972.

Id. at 875.

Despite the *Triplett* court's reasoning, the Second Circuit's analysis of the accrual of the claim in *Mack*, forecloses the similar argument in this case that the claim accrued on the date of the Appellate Division's reversal.

B. *Preclusion of Plaintiff's § 1983 Claim Due to the First Criminal Conviction and its Effect on the Running of the Statue of Limitations*

At the initial criminal trial, when the county court denied Plaintiff's motion to suppress the evidence from the search at trial as a violation of his Fourth and Fifth Amendment Rights, Plaintiff no longer had any legal ground on which to bring his § 1983 claim based on the alleged Fourth and Fifth Amendment violations. "There is no question that state court judgments can have collateral estoppel effect in subsequent section 1983 proceedings." *Anderson v. City of New York*, 611 F.Supp. 481, 486 (S.D.N.Y. 1985) (citing *Migra v. Warren City School District Board*, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 [1984]). *See also, Liner v. Ward*, 754 F.Supp. 32 (S.D.N.Y. 1991). "The standard for determining if litigation of a question in a civil suit is barred by a prior criminal trial is whether the question was 'distinctly put in issue and directly determined' in the criminal prosecution." *Kauffman v. Moss*, 420 F.2d 1270, 1274 (3d Cir. 1970); *See also, McNally v. Pulitzer Publishing Co.*, 582 F.2d 69, 76 (8th Cir. 1976). "In the case of a criminal conviction based on a jury verdict of guilty, issues which were essential to the verdict must be regarded as having been determined by the judgment" *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 569, 71 S.Ct. 408, 414, 95 L.Ed. 584; *Kauffman*, 420 F.2d at 1274. In the present case, Plaintiff raised the issue that the police action was improper in a motion to suppress. The motion was denied. The seized evidence must be considered essential to the verdict as it was the basis for the entire case against Plaintiff. A § 1983 claim based on the issue of suppression of the disputed evidence would have been governed by claim preclusion and, for all practical

purposes, foreclosed by Plaintiff's criminal conviction pending the outcome of the appeal.

While the Second Circuit held in *Mack v. Varelas* that Plaintiff needed to bring his § 1983 claim within the statute of limitations period accruing from the original constitutional violation, they noted that final disposition of the claim would have to wait until the conclusion of state court proceedings. "Our determination that the adjudication should not proceed until the state court criminal proceedings have been concluded is based on the prudential consideration that those proceedings may suffice to establish that Mack's incarceration does not constitute injury." *Mack*, 835 F.2d at 999. They concluded that "the action should be stayed, rather than dismissed, pending termination of the state court criminal proceedings against Mack." *Id.* at 1000.[1] This was true even though the issue on appeal in *Mack* was not identical to the issue underlying the § 1983 claim. The *Mack* court commented: "Nor would an affirmance of Mack's conviction necessarily negate the basis for his claim for damages, for. . . it is likely that the state appellate court will not reach the question of the propriety of the action or inaction by the sheriffs." *Id.* at 998.

In the present case, the issues on appeal in the Appellate Division were identical to the issues which underlie Plaintiff's § 1983 claim. The resolution of the criminal proceedings would certainly provide an answer as to whether or not Plaintiff's Fourth and/or Fifth Amendment rights had been violated. If the county court's determination of the propriety of the police action were allowed to stand, Plaintiff's claim was precluded. Only if the Appellate Division determined that a constitutional violation had indeed taken place would Plaintiff's claim be legally viable.

[1]This reasoning has been expressly followed by the Ninth Circuit in *Young v. Konny*, 907 F.2d 874, 878 (9th Cir. 1989).

The *Triplett* court, facing the same issue, noted that "It is almost too evident to warrant comment that plaintiff, having been convicted of murder by virtue of a confession which in 1955 was deemed legal and admissible, could not have, at that time, pursued a § 1983 claim." *Triplett,* 478 F.Supp. at 875. That court recognized that "[t]o hold that a plaintiff needed to ignore the criminal proceedings and immediately sue under § 1983 would mean that plaintiff would have had to pursue a technically possible, but at the time frivolous suit. To so argue is to read Kafka into law." *Id.*

In circumstances in which the state appellate proceedings will definitely decide the issue underlying a possible § 1983 suit, the policy outlined in *Mack* of requiring the federal court to stay the pending § 1983 suit does not apply with the same force. To require the criminal defendant to bring a civil § 1983 suit before a definitive determination of the issue in state court in order to meet statute of limitations requirements and then require the federal court to stay the action pending the outcome of the state criminal proceedings will lead to a lot of unnecessary filing of claims. Alert criminal defense lawyers will file § 1983 claims as a matter of course, to preserve future § 1983 actions on the chance that the appeals process eventually last longer than the pertinent statute of limitations period. Many of these claims may eventually prove groundless where a conviction is upheld on appeal. Following *Mack*, federal courts would not be able to dispose of these claims until the end of all criminal proceedings in state court and many stayed,

groundless § 1983 claims would ferment in federal court awaiting state appellate outcomes.[2]

Although the persuasive reasoning of the *Triplett* court would avoid these problems, decisions of the Second Circuit and the weight of case law from other circuits require us to decide differently.[3]

C. *Tolling of the Statute of Limitations.*

If, in similar situations, the statute of limitations tolled during plaintiff's incarceration, plaintiffs would be able to maintain potentially valid § 1983 claims without forcing criminal defendants and federal courts to go through the elaborate dance described above in order to keep them alive. Tolling of the statute of limitations can occur as a result of

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[2]As a solution to this problem, we suggest tolling the statute of limitations for § 1983 claims from the date of a criminal conviction to the date of completion of appellate proceedings if the criminal defendant's § 1983 claim would be collaterally estopped by the original state court conviction. Of course, if the issue in the state appellate court is not one that would, if successful, allow the criminal defendant to pursue an otherwise collaterally estopped § 1983 claim, then the current discussion would not be applicable and no reason would exist to toll the statue of limitations.

[3]*See Strung v. Anderson*, 452 F.2d 632 (9th Cir. 1971) which rejected the appellants' argument that their § 1983 action did not accrue until the validity of the contested search and seizure had been adjudicated in the state court criminal proceeding because the § 1983 claim is unaffected by the availability of remedies in a state court to test a constitutional right. *Id.* at 633. *See also, Emory v. Logan*, 801 F.Supp. 899 (D.Mass. 1992) which assumed, without deciding, that even if "plaintiff's criminal conviction would have precluded him from challenging the unlawfulness of the arrest in a subsequent civil rights action, the fact of such estoppel does not operate to toll the statute of limitations for the § 1983 action." *Id.* at 902.

the federal court tolling the limitations period or as a result of a state provision for tolling the limitations period.

1. *Power of Federal Courts to toll state statutes of limitations*

[3, 4]. Federal courts do have the power to toll statutes of limitations borrowed from state law, but only where application of the statute of limitations would frustrate the policy underlying the federal cause of action. *Johnson v. Railway Express Agency, Inc.* 421 U.S. 454, 465, 95 S.Ct. 1716, 1722, 44 L.Ed2d 295 (1975); *Jewell v. County of Nassau*, 917 F.2d 738, 740, (2d Cir. 1990). The Supreme Court has identified the principal policies embodied in § 1983 at deterrence, compensation and uniformity. *Board of Regents v. Tomanio*, 446 U.S. 478 488-89, 100 S.Ct. 1790, 1797-98, 64 L.Ed.2d 440 (1980). In the present case, neither deterrence nor compensation is "significantly affected by this rule of limitations since plaintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by commencing their actions within three years." *Id.* at 488, 100 S.Ct. at 1797. Furthermore, the need for uniformity has not been held to warrant the displacement of state statutes of limitations for civil rights actions. *Id.* at 489, 100 S.Ct. at 1797. As a result, this court does not have the power to toll the statute of limitations in order to allow Plaintiff's § 1983 claim.

2. *Pendent state proceedings not recognized as a reason to toll the statute of limitations.*

The *exclusive* method to maintain a federal claim that may be affected by pending New York State proceedings is

to file within the limitations period whereupon the federal court will be required to stay it. "Where a plaintiff wishes or is required to pursue his claims in succession, rather than concurrently, in the absence of the parties' agreement made to waive the limitary period before it had expired, a judicial stay of the pending suit, rather than dismissal, albeit expressed to be without prejudice, is the only means by which the bar of limitations may be avoided." *Tomanio*, 446 U.S. at 486-87, 100 S.Ct. at 1796; *Jewell*, 917 F.2d at 740-41.

In *Tomanio*, the Court went on to note that:

> [T]here is no question that respondent's § 1983 action was "separate and independent" from the state judicial remedy pursued in state court. This Court has not interpreted § 1983 to require a litigant to pursue state judicial remedies prior to commencing an action under this section...Thus the very independence of § 1983 reveals that the New York rule precluding tolling in the circumstances of this case is not "inconsistent" with the provisions of § 1983. (footnote omitted)

Tomanio, 466 U.S. at 491, 100 S.Ct. at 1798-99. The Court treats a claim under § 1983 as an independent federal remedy and any state policy of repose which does not allow a plaintiff to litigate such alternative claims in succession, without risk of a time bar, is not "inconsistent." *Id.* at 489, 100 S.Ct. at 1797.

3. *New York state provisions for tolling the statute of limitations*

[5] If New York law provides for tolling in this circumstance, then such a toll would be recognized by the federal

court which recognizes not only the state limitations period, but also any state provisions for tolling of the limitations period. *See, e.g., Railway Express,* 421 U.S. at 463-464, 95 S.Ct. at 1721-22.

[6] *In Roldan v. Allstate Insurance Co.,* 149 A.D.2d 20, 544 N.Y.S.2d 359 (2d Dep't 1989), the plaintiff sued the defendant insurance company to pay for a default judgment that was entered against plaintiff in a 1979 tort claim. The defendant contended the suit was time-barred because it was filed in 1986 more than a year past the governing statute of limitations. However, in that case, the original judgment that was the basis of the suit had been vacated in 1982 and then reinstated in 1986. The court in *Roldan* held that under the facts of the case:

> the running of the Statute of Limitations with respect to the plaintiff's cause of action...was suspended as soon as the Supreme Court, by erroneously granting Allstate's motion to vacate the judgment in the underlying action, in effect extinguished the plaintiff's causes of action at Allstate's behest. The running of the Statute of Limitations remained suspended until this court, in February 1986 reversed the order vacating the judgment in the underlying action, thereby reviving the plaintiff's causes of action. Because of this toll, we conclude that the plaintiff's causes of action...are not time-barred.

Roldan, 544 N.Y.S.2d at 368. Similarly, in the present case, the county court's holding in 1990 that the police conduct was proper effectively extinguished Plaintiff's § 1983 claim based on damages suffered as a result of the improper police conduct. The *Roldan* court emphasized, however, that the earlier judgment had been vacated on the defendant's mo-

tion and that the defendant "must bear the responsibility exclusively for the order which deprived the plaintiff of her ability to assert her assigned's case."

Furthermore, the Fourth Department has clearly stated that a "subsequent court decision which affects a party's legal rights does not revive a cause of action which is not timely instituted, or extend the time within which to bring the action or proceeding." *Williamson v. Fermoile,* 31 A.D.2d 438, 298 N.Y.S.2d 557, 560 (4th Dep't 1969).

The current backlog in the New York Appellate Divisions, most notably in the Second Department, exacerbates this problem as it occurs in New York. Many state appellate decisions, like the one in the present case, are not rendered until the statute of limitations period for § 1983 actions has expired.

Nonetheless, the reasoning of the Third Circuit in *Sandutch v. Muroski,* 684 F.2d 252 (3d Cir. 1982), is compatible with the reasoning employed by this circuit. In that case, the plaintiff was wrongly convicted on the basis of fraudulent testimony secured via a conspiracy by public officials. His conviction was reversed approximately three years later, whereupon he brought a civil rights claim under 28 U.S.C. § 1291.

This court held that the statute of limitations began running from the point at which plaintiff had reason to know of the alleged conspiracy to secure false testimony. Applied to the present case, Plaintiff's cause of action accrued on the date he had reason to know he was subject to the improper police conduct, September 25, 1989, the date of his arrest.

The *Sandutch* court also held, contrary to the holding in *Triplett,* 478 F.supp. at 875-76, that continuing incarceration is not a continuing tort because the plaintiff did not allege any unlawful acts within the limitations period, only continued ill effects from the initial violation of his rights. *San-*

dutch, 684 F.2d at 254. This is identical to the present case where the only alleged unlawful conduct occurred before the conviction.

Lastly, the *Sandutch* court held that the limitation period had not been tolled by Sandutch's incarceration. *Id.* Although this is a question of Pennsylvania law and therefore not instructive in the present case, New York law leads us to the same result. New York Civil Rights Law § 79 states that "A sentence of imprisonment in a state correctional institution for any term less than for life...shall not be deemed to suspend the right, or capacity of any person so sentenced to commence and prosecute an action or proceeding in any court...".[4]

The weight of case law, including the Second Circuit's decision in *Mack*, leads us to only one conclusion: Plaintiff's § 1983 claims for false arrest and malicious prosecution accrued at his arrest on September 25, 1989 when the evidence was improperly seized and the statute of limitations did not toll.

III. CONCLUSION

The statute of limitations governing claims pursuant to 42 U.S.C. § 1983 in New York is three years. Because the claim accrued on September 25, 1989 but was not filed until May 1993, and no federal or New York State provision for tolling the statute of limitations pertaining to § 1983 claims applies to the circumstances of this case, Plaintiff's claim for relief is time-barred and defendant's motion to dismiss under Rule 12(b)(6) is granted in its entirety. The Clerk shall enter judgment for the Defendant.

SO ORDERED.

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[4]Until 1973, imprisonment was a disability which would toll the statute of limitations under NY CRL § 79 and under New York Civil Practice Law and Rules § 208, but the state legislature specifically amended both rules to erase that provision.

No. 93-1896

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DARRYL J. WOODS,

Petitioner,

—against—

JOSEPH CANDELA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Introduction

Respondent New York State Trooper Joseph Candela respectfully submits this brief in opposition to the petition for a writ of certiorari. The petition should be denied because it does not raise an important federal question of broad significance which should be settled by this Court.

Statement of the Case

This case has its origin in a search and seizure of petitioner's car which respondent conducted on September 25, 1989. (3A-4A).[1] The search led to petitioner's arrest and indictment. (4A). After an unsuccessful motion to suppress both the evidence seized and statements made to the police, petitioner proceeded to trial and was convicted. *Id.* The evidence seized was introduced during the trial. *Id.*

On January 19, 1993, the judgment of conviction was reversed and the indictment dismissed. *People v. Woods*, 189 A.D.2d 838, 592 N.Y.S.2d 748 (2d Dep't 1993). The Appellate Division held that the search of petitioner's car was unlawful and that statements given by him to the police were involuntary. *Id.* at 841-43, 592 N.Y.S.2d at 750-52.

On May 6, 1993, more than three years after the events which gave rise to it, petitioner filed a complaint in the United States District Court for the Southern District of New York pursuant to 42 U.S.C. § 1983. (4A). He alleged, *inter alia*, that respondent had violated his rights under the Fourth and Fifth Amendments to the Constitution. (4A-5A). On June 25, 1993, the district court (Goettel, J.) granted respondent's motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) on the ground that petitioner's claims were barred by the applicable three year statute of limitations and did not fall within any applicable tolling rules. (10A-25A).

The Court of Appeals for the Second Circuit affirmed. (1A-9A). The court noted, preliminarily, that this action is governed by New York's three year statute of limitations (5A), and held that, for purposes of applying the statute, petitioner's claims accrued on September 25, 1989, the day on which all of respondent's actions with respect to petitioner took place and when petitioner first knew of those actions. (5A-6A). The

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[1] Page references to the Petition and Appendix are shown by "( )" and "(A").

court rejected petitioner's contention that his claims did not accrue until his conviction was overturned, relying on its earlier decision in *Mack v. Varelas*, 835 F.2d 995 (2d Cir. 1987), in which it held that the district court should stay, rather than dismiss, a timely filed section 1983 action which could be affected by pending state court proceedings. (6A-8A).

Noting that New York law governs the tolling of the statute of limitations, the court of appeals then held that there was no provision in such law for tolling the statute of limitations on the facts of this case. (8A). In addition, the court concluded that there was no reason to displace state law because the policies of deterrence and compensation which underlie section 1983 would not be "significantly affected" by application of New York's tolling rules. (8A-9A).

REASONS FOR DENYING THE WRIT

Petitioner seeks certiorari to review the decision of the court of appeals insofar as it held that, where a plaintiff's section 1983 cause of action has accrued, but state court criminal proceedings are pending with respect to a factual and legal issue common to both proceedings, the statute of limitations is not tolled and the plaintiff is required to commence his section 1983 action within the appropriate limitation period. Petitioner contends that this decision places him and other criminal defendants in the untenable position of having to initiate a civil rights action while subject to collateral estoppel, and does not serve the purposes of 42 U.S.C. § 1983. (4-6). Accordingly, petitioner argues that the statute of limitations should be tolled in such circumstances. This argument does not present an issue which warrants review by this Court.

Tolling of the statute of limitations is a question of state law. *Board of Regents v. Tomanio*, 446 U.S. 478, 483-86 (1980); *see also Hardin v. Straub*, 490 U.S. 536, 539 (1989). Although New York law tolls statutes of limitations in a num-

ber of ways, it does not do so in any way applicable to petitioner. Specifically, New York law does not provide a toll for the period during which criminal proceedings against the plaintiff are ongoing, *see Singleton v. City of New York*, 632 F.2d 185, 191 (2d Cir. 1980), *cert. denied*, 450 U.S. 920 (1981), or the plaintiff is incarcerated (25A). In recognition of this fact, petitioner argues that the statute of limitations should be judicially or equitably tolled as a matter of federal law to permit plaintiffs to institute their actions after a final determination of their criminal proceedings where the precise issues to be raised in the civil action will necessarily be determined in the criminal proceeding. (6).

With the exception of the Court of Appeals for the Seventh Circuit, this argument has been rejected by every court of appeals which has considered it. *Kyricopoulos v. Town of Orleans*, 967 F.2d 14, 15-16 n.1 (1st Cir. 1992); *Jewell v. County of Nassau*, 917 F.2d 738 (2d Cir. 1990) (*per curiam*); *Mack*, 835 F.2d 995; *Singleton*, 632 F.2d at 193; *Richardson v. Fleming*, 651 F.2d 366, 373 (5th Cir. 1981); *Lown v. Brimeyer*, 956 F.2d 780 (8th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 176 (1992); *Offet v. Solem*, 823 F.2d 1256, 1258 n.2 (8th Cir. 1987); *Young v. Kenny*, 907 F.2d 874, 878 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991). For example, in *Jewell*, the court held that "[w]here a plaintiff wishes or is required to pursue his claims in succession, rather than concurrently, in the absence of the parties' agreement made to waive the limitary period before it had expired, *a judicial stay of the pending suit*, rather than dismissal, albeit expressed to be without prejudice, *is the only means by which the bar of limitations may be avoided*." 917 F.2d at 740-41 (emphasis added).

Although these decisions are not direct authority for the dismissal of petitioner's case since all concerned the handling of timely filed actions, their logic is clear, *i.e.*, a plaintiff whose criminal proceedings remain ongoing must commence his civil rights action within the usual statutory period and

then have the federal action stayed pending completion of the criminal proceedings, rather than waiting for the completion of the criminal proceedings.

The only court of appeals decision which appears to support petitioner is *Heck v. Humphrey*, 997 F.2d 355 (7th Cir. 1993), *aff'd on other grounds*, ___ U.S. ___, 114 S. Ct. 2364, 62 U.S.L.W. 4594 (June 24, 1994) (No. 93-6188). Although this Court did not reach this issue in affirming the decision of the Seventh Circuit in *Heck*, 62 U.S.L.W. at 4597, it did note that this aspect of the Seventh Circuit's decision was contrary to the holding in *Tomanio* that state tolling provisions apply to section 1983 actions, and that the court of appeals had distinguished *Tomanio* "on the ground that petitioner's claim was 'in part one for habeas corpus.' " *Heck*, 62 U.S.L.W. at 4597 (citation omitted). The distinction relied on by the Seventh Circuit does not apply in this case since petitioner's claim would not necessarily require that his conviction be invalidated.[2]

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[2] The decision in *Heck v. Humphrey*, ___ U.S. ___, 114 S. Ct. 2364, 62 U.S.L.W. 4594 (June 24, 1994) (No. 93-6188), does not affect the underlying decision of the court below that petitioner's cause of action accrued at the time of the search. In *Heck*, 62 U.S.L.W. at 4597, the Court held that there is no cause of action for damages under section 1983 in an action in which a judgment for the plaintiff "would necessarily imply the invalidity" of the plaintiff's conviction unless and until plaintiff can show that the conviction has been invalidated. In so holding, the Court noted that no statute of limitations problem was presented while the plaintiff was attempting to invalidate the conviction because "the § 1983 claim has not yet arisen." *Id.*

However, the Court also concluded that where "the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." *Heck*, 62 U.S.L.W. at 4597 (emphasis in original) (footnotes omitted). The Court gave as an example "a suit for damages attributable to an allegedly unreasonable search. . ." and stated that "[b]ecause of doctrines like independent source and inevitable discovery, . . . , and especially harmless error, . . . , such a § 1983 action, even if successful, would not

Petitioner also claims that, in this case, as in *Triplett v. Azordegan*, 478 F. Supp. 872 (N.D. Iowa 1977), collateral estoppel considerations counsel against requiring recourse to the federal court within the limitation period. Petitioner's reliance on *Triplett* is misplaced. Beyond the fact that *Triplett* is an isolated decision which apparently has never been followed by any other court, and may very well have turned on its egregious facts, *Triplett*'s holding was rejected by the court of appeals having authority over that district court. *Offet*, 823 F.2d at 1258 n.2. Moreover, as the court below correctly concluded in rejecting this argument, petitioner's "fear of the preclusive effect of the state trial court decision is unfounded." (8A). Thus, pursuant to the Second Circuit's decision in *Mack v. Varelas*, if petitioner had filed a timely action, it could not have been dismissed during the pendency of the state appeal.

Finally, petitioner contends that the deterrence and compensation policies which underlie section 1983 require that the statute of limitations be tolled in circumstances like those which exist in this case. (4). However, petitioner's theory does not advance the federal policies upon which section 1983 focuses. Extending the period within which an action can be commenced will neither deter allegedly wrongful conduct nor increase the compensation already available for such alleged wrongs. As the court of appeals recognized (8A-9A) (citation omitted),

> "neither deterrence nor compensation is 'significantly affected by this rule of limitations since plaintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by com-

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necessarily imply that the plaintiff's conviction was unlawful." *Id.* at 4597 n.7 (emphasis in original) (citations omitted).

Petitioner's action, alleging violation of "his Fourth Amendment right to be free from unreasonable searches and seizures without probable cause and his Fifth Amendment right to remain silent," (3), falls directly within footnote 7's exception.

> mencing their actions within three years.' . . . The . . . requirement that federal courts stay § 1983 actions until the completion of state court proceedings protects plaintiffs by allowing them to commence their actions without fearing that the lower state court decision will bar recovery; at the same time, the requirement that plaintiffs file within three years protects defendants by putting them on notice of the claim and allowing them to preserve evidence for their defense."

Conclusion

For the reasons set forth herein, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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